Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

STEPHEN C. ORR

Petitioner

vs.

WAL-MART STORES, INC.,

Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court below failed to properly consider eating as a major life activity when deciding whether a person is "disabled" for purposes of the Americans With Disabilities Act

II. Whether, under the Americans With Disabilities Act, an employer can claim that an employee is not "disabled" because his diabetes is controlled by insulin and diet when the employer requires the removal of one of the measures of control, diet.

PARTIES TO THE PROCEEDING

Stephen Orr, Petitioner

Wal-Mart Stores, Inc., Respondent

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IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN C. ORR,

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V.

WAL-MART STORES, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Stephen C. Orr, Petitioner, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

CITATIONS OF OPINIONS AND ORDERS BELOW

Stephen C. Orr v. Wal-Mart Stores, Inc., Case No. 7:99CV5020 (District Court for the District of Nebraska) (July 6, 2001). Stephen C. Orr v. Wal-Mart Stores, Inc. No. 01-2959 (Eighth Circuit, July 22, 2002) (Appendix A). Petition For Rehearing En Banc denied September 18, 2002. (Appendix B).

BASIS FOR JURISDICTION

Summary judgment was granted to the Respondent, Wal-Mart Stores, Inc., on July 6, 2001, at the District Court level. The District Court held that since the Petitioner, Stephen C. Orr, was able to control his diabetes through a regimen of insulin, blood sugar monitoring, and diet, he was not "disabled" as defined by the Americans With Disabilities Act, 42 U.S.C. §12102(2)(A). The Petitioner timely filed an appeal to the United States Court of Appeals for the Eighth Circuit. On July 22, 2002, the Eighth Circuit (with Judge Lay dissenting), upheld the District Court's opinion dismissing the lawsuit. A Petition for En Banc was timely filed and was denied on September 18, 2002. The Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Jurisdiction was vested in the Eighth Circuit pursuant to 28 U.S.C. § 1291. The District Court's jurisdiction was founded upon 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED
42 U.S.C. § 12102

Under the Americans With Disabilities Act, a disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). It is this statute and this Court's interpretation of this statute that is at issue in the present case.

STATEMENT OF THE CASE

Petitioner, Stephen C. Orr, was employed as a pharmacist at the Chadron, Nebraska store of the Respondent, Wal-Mart Stores, Inc. (hereinafter "Wal-Mart"). Petitioner is diabetic and when he was interviewed by the management of

the Respondent's store, he informed them that in order to properly control his diabetes, he needed to regularly monitor his blood sugar, inject himself with insulin, and have a regularly scheduled, uninterrupted lunch break. During the hiring process, the Respondent store agreed to let Mr. Orr take these needed uninterrupted breaks.

Once Mr. Orr began work, Mr. Orr's immediate supervisor learned that Mr. Orr was a diabetic and was closing the pharmacy in order to take these uninterrupted lunch breaks. His supervisor issued a warning to Mr. Orr that he could not take these breaks and informed Mr. Orr that he would have to stay in the pharmacy, overseeing the pharmacy techs, the entire time he was working, and could only eat in between serving customers. Mr. Orr tried to comply with the request, but was unable to do so due to his diabetes. Mr. Orr, who had years of experience in controlling his diabetes, became aware of the symptoms of hypoglycemia due to his inability to take the regularly scheduled lunch breaks as previously agreed. Mr. Orr's supervisor issued him a "performance coaching," a written warning, indicating that if he took another such lunch break, his employment would be terminated. Mr. Orr replied that he would have to continue to take these lunch breaks, as per the original agreement, and as needed to control his diabetes. Mr. Orr's employment was then terminated.

On October 19, 1999, Mr. Orr filed his complaint in the United States District Court. The complaint alleged that Wal-Mart terminated his employment in violation of his rights under the Americans With Disabilities Act (hereinafter "ADA"), and the State equivalent disability discrimination statute, the Nebraska Fair Employment Practices Act, Neb. Rev. Stat. § 48-1101 *et seq.*, because he was fired due to the fact that Wal-Mart failed to make reasonable accommodation

as to Mr. Orr's disability as is required by these laws. On July 6, 2001, the District Court issued its Memorandum and Order granting summary judgment to Wal-Mart. The District Court held that Mr. Orr did not qualify as an individual with a disability within the meaning of the ADA.

Mr. Orr was diagnosed with diabetes and began insulin treatment in January of 1986. He uses a glucometer to measure the amount of the glucose in his blood several times a day. Mr. Orr used this device at the time he was employed by the Respondent. While working for Wal-Mart, Mr. Orr was required to inject himself with insulin on a daily basis. Shortly after being employed by Wal-Mart, Mr. Orr began using an insulin pump which is attached to his body 24 hours a day to maintain a normal insulin regimen. Mr. Orr is licensed to practice pharmacy in Nebraska, Wyoming, and South Dakota, and has been a pharmacist since 1976.

Due to Mr. Orr's diabetic condition, he needs to stay on a strict and regimented diet which allows him to eat his lunch at a certain time every day, without interruptions. Mr. Orr claims that this uninterrupted lunch break allows him to properly control his diabetes along with constant monitoring of his blood sugar levels and insulin injections. Mr. Orr's consultation with his doctor, his prior experience and training have led to this regimen of control for his diabetes. Wal-Mart has offered no evidence disputing Mr. Orr's condition, or his regimen of treatment.

Some of the ways that Mr. Orr's diabetes impacted his life, in addition to monitoring his blood level and injecting himself with insulin and eating regularly scheduled nutritionally complete meals, are deteriorating vision, slurred speech, frequent urination, lack of concentration, lack of physical strength, lack of coordination, troubles walking, and

the loss of conscieceness. Mr. Orr has occasionally been hospitalized because of these symptoms. Mr. Orr also testified that occasionally, especially at night while sleeping (and unable to monitor his blood sugar levels), he suffers from seizures which cause extremely sore muscles, a chewed up tongue, dislocated shoulders, and hospitalization. Diabetes is not currently curable. It is, however, treatable. If left untreated, it can result in blindness, the loss of limbs, seizures, coma, or even death.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE EIGHTH CIRCUIT IN THIS MATTER IS IN CONFLICT WITH AT LEAST ONE OTHER CIRCUIT ON THE SAME ISSUE.

The Eighth Circuit's opinion holds that "our review of the record establishes that Orr does not have an actual disability which presently and substantially limits a major life activity. He is therefore not disabled under the ADA or the NFEPA." (Nebraska Fair Employment Practices Act) (Panel opinion at page 6). In its opinion, the Eighth Circuit held that "Orr did not allege his complaint or argue in the District Court that eating is a major life activity which is substantially limited because of his diabetes." (Panel opinion at page 7). In his dissent, Judge Lay writes,

> "The majority faults Orr for not raising the issue of eating as a limitation on one of his life's major activities before the District Court. In all due respect, this is a myopic treatment of the record before the District Court."

(Panel opinion at page 9).

In fact, a cursory review of the complaint indicates that the great majority of the facts, indeed all of the complaint, revolve around the issue of whether or not Mr. Orr could have a regularly scheduled "uninterrupted lunch break." Paragraph 10 of the complaint filed in the District Court states:

> "10. Plaintiff's disability is such that he must eat regular meals in order to regulate his blood sugar and control this condition. The Defendant knew of the Plaintiff's diagnosis and of his disability prior to the time of his termination. The Plaintiff's condition substantially limited one or more of the Plaintiff's major life activities, including, but not limited to, his ability to perform the functions of his position without a regular, uninterrupted lunch break."

The entire case is about whether or not Mr. Orr should be entitled to an uninterrupted lunch break in order to control his diabetes.

Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002), held that disability analysis required the substantial limitations to be on activities that are of central importance to most people's lives. Bragdon v. Abbott, 524 U.S. 624, 641-642 (1998), requires that determinations under the ADA require individualized assessments. This Court also in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999), held that this "individualized inquiry", which is mandated by the

ADA, should not be based on how an uncorrected impairment usually affects those who have it, but rather on the "individual, actual condition." Sutton at 483.

In the instant case, Mr. Orr has stated with specificity numerous ways in which his diabetes affects his life, to some extent on a daily basis, and to a very large extent, on a sporadic basis.

With regard to a condition that manifests itself episodically, the Seventh Circuit has held "[t]hat neuropathy manifests itself in a predictable yet intermittent pattern does not preclude a finding that one suffering from the condition can be termed disabled." Id. at 434 n.4.

The Seventh Circuit has discussed diabetes and the ADA at great length in the case of Nawrot v. CPC International, 277 F.3d 896 (7th Cir. 2002). The plaintiff in Nawrot was described by the Seventh Circuit Court as follows:

> "However, Nawrot's claim does not rest solely on his diabetic status. He also points out that as a consequence of his diabetes, he must inject himself with insulin approximately three times a day, and must test his blood sugar level at least ten times a day. In addition, although he is able to manage his diabetes with constant monitoring and insulin injections (itself a substantial burden), this hardly remedies all the other adverse effects of his diabetes. Despite the most diligent care, Nawrot cannot

> completely control his blood sugar level. He suffers from unpredictable hypoglycemic episodes, of such extreme consequence that death is a very real, significant risk. On occasions he suffers from such an episode, his ability to think coherently is significantly impaired, as well as his ability to function. He has lost conscieceness and fallen several times. In addition, his ability to express coherent thoughts is impaired, causing him to make non-sensible statements. He suffered three diabetic episodes at work in the two years before his termination, and aside from full-blown diabetic episodes, Nawrot has had 'close calls' where he felt the onset of an episode, but was able to avert a serious, debilitating attack." Id.

In Nawrot, the employer refused to grant Mr. Nawrot the accommodations needed to manage his diabetes, including taking breaks for monitoring and diet. Mr. Nawrot chose his employment over treatment, and suffered as a result. In the instant case, Mr. Orr knew what would happen if he was not properly accommodated, and therefore, chose to be terminated rather than risk the consequences to his health.

In Lawson v. CSX Transportation, Inc., 245 F.3d 916 (7th Cir. 2001), the Seventh Circuit described the plaintiff as follows:

> "On a daily basis, Mr. Lawson must endure the discomfort of multiple

> blood tests to monitor his blood glucose levels. He also must adjust his food intake and the level of exertion to take into account fluctuations in blood sugar. When his blood sugar drops he must, 'stop all other activities and find the kinds of food that will bring his levels back to normal or he will experience disabling episodes of dizziness, weakness, loss of mentation and concentration, and a deterioration of bodily functions.' Mr. Lawson's physician characterized the measures he must take to manage his disease as a 'perpetual, multifaceted, and demanding treatment regimen' requiring 'continued vigilance'. 'If Mr. Lawson fails to adhere strictly to this demanding regimen, the consequences could be dire. He could experience debilitating and potentially life threatening symptoms. This evidence is sufficient for a jury to find that Mr. Lawson is substantially limited with respect to the major life activity of eating.'

Id. at 924 (record citations omitted)

Again, the Seventh Circuit is describing almost verbatim Mr. Orr's undisputed description of his own condition, but more importantly, it highlights how these conditions are genuine issues of material fact to be decided by a jury, not a judge on summary judgment.

In a recent case, the EEOC sued Wal-Mart Stores for a similar issue. In EEOC and Landers v. Wal-Mart Stores, Inc., 2001 U.S. Dist. LEXIS 23027 (W.D. NY. 2001), a diabetic employee was denied a regularly scheduled lunch break to manage his diabetes. In that case, the employee actually lost conscieceness due to the diabetes being improperly managed.

Mr. Orr must ask these questions to this Court: *Does a potential plaintiff have to lose the ability to think clearly, to speak without slurring, to see, in order to preserve his claim under the Americans With Disabilities Act? Does the potential plaintiff have to lose conscieceness or slip into a diabetic coma in order to preserve his claim under the Americans With Disabilities Act? Does a potential plaintiff have to die from complications brought on by unmanaged diabetes in order to preserve his claim under the Americans With Disabilities Act?* Surely the answer must be no.

II. WHETHER AN EMPLOYER CAN CLAIM THAT AN EMPLOYEE IS NOT DISABLED BECAUSE HIS DIABETES IS CONTROLLED BY INSULIN AND DIET WHEN THE EMPLOYER REQUIRES THE REMOVAL OF ONE OF THE MEASURES OF CONTROL, SUCH AS DIET.

Although there is a split in the circuits regarding eating as a major life activity and the impact of diabetes on an individual plaintiff, there is one issue in this case that has not been decided by this Court, or the Circuit Courts. That issue is whether or not an employer can avoid being sued under the Americans With Disabilities Act by applying the basic tenet of Sutton v. United Airlines, *supra,* which holds

that an ADA plaintiff must be considered as disabled after factoring in mitigating measures, such as eyeglasses. The question for this Court is what happens if the employer takes away the mitigating measure. For instance, if Wal-Mart had a rule prohibiting needle injections into oneself in the workplace, could Wal-Mart then escape liability by claiming that those same injections make the individual not "disabled" under the ADA? Would that employee then be not qualified to request an exception to this rule as a reasonable accommodation? A small but important distinction must be drawn between this case and Sutton, where the employer removes the mitigating factor, the condition should be considered in its unmitigated state.

If, as in Nawrot, the employee acquiesces and his health deteriorates, then the employee is truly "disabled" (and may be dead). Surely it was not the intention of this Court in Sutton or Bragdon, or Toyota, to arrive at such a result. In a recent case from the First Circuit, Gillen v. Fallon Ambulance Service, Inc., 283 F.3d 11 (1st Circuit 2002), the Court described how many disabled individuals adopt a "can do" attitude and do everything they can, even going against doctors' wishes to stay a productive member of society.

> "In concluding that the appellant had no substantial limitation on her ability to lift, the district court relied upon two items. The first of these was the appellant's optimistic self assessment of her capabilities. This consideration deserves little weight. Although the appellant took an upbeat view of her prowess (when [defendant's] counsel asked, during her deposition, if there was anything that she would like to do

> that she had not been able to do because of her missing hand, she replied, 'no'). That was more a testament to her determination than to her condition. She did not dwell on the restrictions on lifting that she had to overcome in over to achieve her objectives – and those restrictions comprised the focal point of this prong of the ADA inquiry. The key question is not whether a handicapped person accomplishes her goals, but whether she encounters significant handicap – related obstacles in doing so. For summary judgment purposes, we must resolve this question in the appellant's favor."

Id. at 17-18.

Mr. Orr should not have to slip into a coma *because* of the restrictions on his diet in order to argue about the reasonableness of his accommodation request. Such a holding would require employees to choose between their health and a lawsuit, and would severely eviscerate the purpose of the Americans With Disabilities Act.

Although Sutton and Bragdon caution us not to stray into the speculative world of "could haves" and "would haves," when the employer removes the mitigating device, probabilities become certainties and an employee's knowledge of his own condition and its treatment should be considered.

CONCLUSION

For the foregoing reasons, and to prevent manifest injustice, the Appellant hereby requests that this matter be remanded back to the District Court with a finding that Mr. Orr is a qualified person with a disability, and a trial be had on the reasonableness of his accommodation request.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-2959

Stephen C. Orr,	*	
	*	
Appellant,	*	
	*	Appeal from the United
vs.	*	States District Court for
	*	the District of Nebraska.
Wal-Mart Stores, Inc.,	*	
	*	
Appellee.	*	

Submitted: April 19, 2002

Filed: July 22, 2002

Before BOWMAN, LAY, and RILEY, Circuit Judges.

RILEY, Circuit Judge.

Stephen Orr (Orr) filed a law suit against Wal-Mart Stores, Inc. (Wal-Mart) alleging violations of the Americans with Disabilities Act (ADA) and the Nebraska Fair Employment Practices Act (NFEPA). Concluding Orr failed to show he was disabled under either the ADA or the NFEPA, the district court[1] granted summary judgment in favor of Wal-Mart. Orr appeals. We affirm.

I. BACKGROUND

Stephen Orr is a pharmacist licensed in Nebraska, Wyoming, and South Dakota. In 1986, Orr was diagnosed with diabetes. To control his diabetes, Orr uses a glucometer to monitor his blood glucose levels, takes insulin, and eats a special diet within thirty minutes of taking insulin. During the time relevant to this lawsuit, Orr injected insulin three times each day -- in early morning, at noon, and before bedtime. Orr controls his disease to the best of his ability. When his diabetes is not well controlled, he suffers from vision impairment, low energy, lack of concentration and mental awareness, lack of physical strength and coordination, slurred speech, difficulties typing and reading, and slowed performance.

In January 1998, Orr became employed full time as a pharmacist at a Wal-Mart store in Chadron, Nebraska. This Chadron store was a single-pharmacist Wal-Mart facility, and Orr was the only pharmacist on duty during his work day. Before accepting employment, Orr informed Wal-Mart District Manager Rick Coleman (Coleman) he was an

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[1]The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

insulin-dependent diabetic. Coleman authorized Orr to take a lunch break and mid-day breaks during his ten-hour work shift. Orr understood Coleman to authorize him to take an uninterrupted lunch break, and Orr routinely closed the pharmacy for thirty minutes over the noon hour to eat lunch.

John Foss (Foss) succeeded Coleman as district manager in charge of the Chadron store. Foss informed Orr that Wal-Mart policy[2] required the pharmacy to remain open during store hours and instructed Orr not to close the pharmacy during his lunch break. Orr did not comply with Wal-Mart policy and continued to close the pharmacy for thirty minutes in order to take an uninterrupted lunch. On March 5, 1998, Foss issued Orr a written warning for closing the pharmacy. The written warning stated that further non-compliance would result in Orr's termination.

Orr responded in writing to the warning with his action plan and without mentioning his diabetes.

> Per this presentation & our discussion of the issues a[t] hand. I respectfully

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[2]The applicable part of the Wal-Mart Breaks/Lunch Period policy stated:

> In pharmacies with one pharmacist on duty, the pharmacist cannot leave the pharmacy area unsupervised for any regular length of time for breaks or lunch periods. Therefore, the pharmacist will take time between busy periods for a break or eating lunch **in** the pharmacy prescription area.

(emphasis in original).

> protest this presentation & Decision-Making Day. My understanding of time off for lunch & breaks apparently was a mis-understanding of company policy as presented by Rick Coleman. My leaving the Pharmacy on 2/25 was specifically for company (Pharmacy) business to pick up a CII Rx at the Clinic.
>
> I will from this date forward take my lunch break within the confines of the Pharmacy & maintain the opening of the Pharmacy from 9-7AM Mon.-Fri & 9-6 on Sat during my scheduled days shift.

Orr initially abided by Wal-Mart's policy and kept the pharmacy continuously open during store hours. However, a week after receiving the written warning, Orr wrote to Foss requesting he rescind the written warning based on Orr's original understanding and agreement with Coleman. Orr stated, in part: "I had discussed with Rick Coleman during the interview process conducted at Wal-Mart in Rapid City, that I was an Insulin Dependent Diabetic. Rick Coleman agreed that I could take lunch breaks." On April 8, 1998, after receiving no response, Orr wrote to Foss again asking him to remove the written warning from Orr's personnel file. In his second letter, Orr informed Foss that, due to his adherence to Wal-Mart policy requiring the pharmacy to remain open, he was unable to eat until "much after noon, resulting in my experiencing symptoms of hypoglycemia." Orr expressed concern that not having an uninterrupted lunch break could adversely affect the control of his diabetes.

On April 17, 1998, Foss wrote to Orr and advised him that the written warning would not be rescinded. Foss said he had discussed the situation with higher management. Foss's letter informed Orr that Coleman denied ever authorizing Orr to close the pharmacy to take a lunch break. In his letter Foss also explained that Wal-Mart had always permitted Orr to control his diabetes by bringing food into the pharmacy, providing access to a refrigerator, and allowing him to eat or snack in the pharmacy.

On April 24, 1998, Orr wrote Foss and again asked him to rescind the written warning. Orr's letter relayed to Foss that working in the pharmacy without an uninterrupted daily lunch break was adversely affecting the control of his diabetes. On May 7, 1998, Orr wrote another letter to Foss, informing him that, as a result of the no lunch break policy, Orr had incurred several low, hypoglycemic incidents. Orr expressed his disappointment with Wal-Mart's indifference to his needs as a diabetic, and Orr informed Foss he was resuming noon lunch breaks away from the pharmacy for the maintenance of his diabetic health. Thereafter, Foss terminated Orr.

II. DISCUSSION

Orr argues the district court erred in finding he was not disabled within the meaning of the ADA. Under the ADA, a disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A).

The disability discrimination provisions in the NFEPA are patterned after the ADA, and the statutory definitions of "disability" and "qualified individual with a disability" contained in the NFEPA are virtually identical to

the definitions of the ADA. See Neb. Rev. Stat. Ann. § 48-1102(9) & (10); 42 U.S.C. §§ 12102(2), 12111(8). In construing the NFEPA, Nebraska courts have looked to federal decisions, because the NFEPA is patterned after Title VII and the ADA. See, e.g. Father Flanagan's Boys' Home v. Agnew, 590 N.W.2d 688, 693 (Neb. 1999); IBP, Inc. v. Sands, 563 N.W.2d 353, 357-59 (Neb. 1997). We therefore employ the same analysis to determine whether Orr's diabetes constitutes a disability under both the ADA and the NFEPA.

In Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999), the Supreme Court held that the threshold inquiry whether an individual is disabled is analyzed on an individualized basis. The Court concluded that a diabetic is not per se disabled but must demonstrate his condition substantially limits one or more major life activities. Id. at 482-83. The Court emphasized that "[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity." Id. at 482-83.

Orr claims his diabetes substantially affects his ability to see, speak, type, read, and walk. Orr also argues "it would not be unreasonable to expect that [his] diabetic condition will significantly disrupt his lifestyle." (emphasis added). Orr also contends that if he fails to properly monitor and treat his diabetes, then he "could experience"adverse symptoms which "would . . . substantially limit [his] major life activity of working." (emphasis added).

The Supreme Court in Sutton expressly ruled that "[a] 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might', 'could,' or 'would' be substantially limiting if mitigating measures were not taken." Sutton, 527 U.S. at 482 (emphasis added).

Therefore, neither the district court nor we can consider what would or could occur if Orr failed to treat his diabetes or how his diabetes might develop in the future. Rather, Sutton requires that we examine Orr's present condition with reference to the mitigating measures taken, i.e., insulin injections and diet, and the actual consequences which followed. See id.

In resisting summary judgment, Orr failed to present evidence explaining either how diabetes .substantially affects his major life activities or the duration and frequency of any limitations. "[M]ost disabilities from which people suffer," including diabetes, "do not have a substantial enough effect on their major life activities." Berg v. Norand Corp., 169 F.3d 1140, 1145 (8th Cir. 1999) (quoting Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 675 (7th Cir. 1998)). Health conditions that cause moderate limitations on major life activities do not constitute disabilities under the ADA. See Taylor v. Nimock's Oil Co., 214 F.3d 957, 960 (8th Cir. 2000) (heart disease); Weber v. Strippit, Inc., 186 F.3d 907, 914 (8th Cir. 1999) (heart disease). To hold otherwise could expand the ADA to recognize almost every working American as disabled to some degree.

Our review of the record establishes that Orr does not have an actual disability which presently and substantially limits a major life activity. He, therefore, is not disabled under the ADA or the NFEPA.

On appeal, Orr argues eating is a major life activity that is substantially limited due to his diabetes, and the necessity of adhering to a strict dietary regimen substantially

limits the major life activity of working.[3] He urges this panel to adopt the holding of a recent Seventh Circuit case that, in the context of insulin-dependent diabetes, eating constitutes a major life activity. See Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001).[4] Orr did not allege in his complaint or argue in the district court that eating is a major life activity which is substantially limited because of his

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[3]In Sutton, the Supreme Court assumed working is a major life activity, but questioned whether it is, noting the EEOC's reluctance to define major life activities to include working and its suggestion that working be considered a residual life activity. Sutton, 527 U.S. 492 (citing 29 C.F.R. pt. 1630, App.§ 1630.2(j)(1998)). More recently, the Supreme Court expressed skepticism as to whether working can be a major life activity, but did not decide the issue. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681,692 (2002) (Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today). In this circuit we have followed Sutton and Toyota in assuming, without conclusively ruling, that working constitutes a major life activity for purposes of applying the ADA. See Duty v. Norton-Alcoa Proppants, No. 01-1478, 2002 WL 1312197, at *17n.3 (8th Cir. June 18, 2002); Kellogg v. Union Pacific R.R., 233 F.3d 1083, 1087 (8th Cir. 2000)

[4]We note Lawson was first cited by the district court in a footnote within its Memorandum and Order granting summary judgment.

diabetes.[5] Ordinarily, we do not consider an argument raised for the first time on appeal. See Shelton v. ContiGroup Cos., 285 F.3d 640, 643 (8th Cir. 2002); Berg, 169 F.2d at 1145. We consider a newly raised argument only if it is purely legal and requires no additional factual development, or if a manifest injustice would otherwise result. Orion Fin. Corp. Of S.D. v. Amer. Foods Group, Inc., 281 F.3d 733, 740 (8th Cir. 2002). Orr does not persuade us that either exception applies. We therefore decline to consider the argument on appeal.[6]

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[5]Had Orr established a prima facie case of actual disability under the ADA, Wal-Mart could have raised the threat-to-self defense. Wal-Mart could have argued that, accepting Orr's contentions at face value, working in a single-pharmacist pharmacy, which did not provide for uninterrupted meal breaks, posed a direct threat to Orr's health and that Wal-Mart was justified in not continuing his employment. See Chevron v. U.S.A. Inc. V. Echazabal, 122 S.Ct. 2045 (2002).

[6]Even if the limitations on Orr's ability to eat can be tied to his ability to work, they cannot salvage his claim under the ADA. "When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, the plaintiffs allege they are unable to work in a broad range of jobs." Sutton, 527 U.S. at 491. See also 29 C.F.R. pt. 1630.2(j)(3)(I), App. § 1630.2(j) (2000). The record reveals only that Orr's diabetic condition occasionally produced symptoms which moderately impaired his performance as a pharmacist in a single-pharmacist-on-duty retail store. In contrast to the diabetic plaintiff in Lawson, Orr consistently performed the essential functions of a pharmacist before,

III. CONCLUSION

For the reasons cited above, we affirm the judgment of the district court.

LAY, Circuit Judge, dissenting.

I respectfully dissent.

Based upon the evidence in this particular case, I think the court errs in holding that the claimant, Stephen C. Orr, was not disabled as a matter of law within the meaning of the Americans with Disabilities Act of 1990 (ADA). The court refuses to consider Orr's contention that he was substantially limited in the major life activities of working and eating because the Seventh Circuit decision upon which he relies, Lawson v. CSX Transp., Inc, 245 F.3d 916 (7th Cir. 2001), is first cited in a footnote in the district court's decision. I know of no precedent in this or any other circuit that says a party must cite a particular case in the district court in order to rely upon it on appeal.

The majority opinion cites Shelton v. ContiGroup Cos., 285 F.3d 640 (8th Cir. 2002), and Berg v. Norand Corp., 169 F.3d 1140 (8th Cir. 1999), to support its refusal to entertain Orr's argument. The court's reliance on these cases is misplaced. In Berg, we refused to allow a plaintiff to claim

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during, and after his employment with Wal-Mart. Because Orr's diabetes, as portrayed by the record in this case, at most, only moderately limits his ability to perform a particular specialized job or a narrow range of retail pharmacist jobs, his diabetic condition does not place substantial limitations on his ability to work.

for the first time on appeal that her employer perceived her as disabled. Berg, 169 F.3d at 1145. Under the ADA, being regarded as disabled--as opposed to actually being disabled-is a separate and distinct basis for liability. Compare 42 U.S.C. § 12102(2)(A) with § 12102(2)(C). Here, however, Orr's argument has consistently been that he suffered from "a physical . . . impairment that substantially limits one or more of [his] major life activities. 42 U.S.C. § 12102(2)(A). While it is generally true that courts do not consider arguments first raised on appeal," Shelton, 285 F.3d at 643, this does not preclude us from considering Orr's use of Lawson to support his argument that he suffers from a disability affecting one or more of life's major activities.

The majority faults Orr for not raising the issue of "eating" as a limitation on one of his life's major activities before the district court. In all due respect, this is a myopic treatment of the record before the district court. Orr's entire case turned on the refusal of his employer to allow Orr to follow a dietary regimen. Orr's argument focused on eating but eating is inextricably related to "working."[7] As the district court acknowledged, plaintiff claimed that he was substantially limited in his ability to work. This claim,

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[7]The majority suggests that under Sutton, the Supreme Court has not yet decided whether working is one of life's major activities. It is much too late in the day in this circuit to hold that working may not be one of the major life activities under the ADA. See Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 954-55 (8th Cir. 1999); Helfter v. United Parcel Service, 115 F.3d 613, 617 (8th Cir. 1997). Such dicta is a poor crutch to deny Orr, or any other ADA litigant, his day in court.

however, was obviously based upon Orr's ability to control his regulated diet and insulin injections. Thus, eating at defined times is directly related to his ability to work. Orr's whole complaint as well as the evidentiary record relates to Wal-Mart's refusal to allow Orr to eat during a lunch break. To suggest eating was not raised in the district court slights the entire evidentiary record. Orr's claim before the district court is that if he is not allowed to follow his dietary regimen, he becomes completely disabled.

In Lawson, the Seventh Circuit discussed eating as one of life's major activities, but did so in terms of Lawson's ability to work: "Mr. Lawson's diabetes has limited substantially his ability to work in a broad class of jobs . .. We believe that a jury could conclude, from this evidence, that Mr. Lawson can show that a record exists indicating that his diabetes has limited substantially his ability to work." 245 F.3d at 926-27. The court reasoned that the plaintiff must always concern himself with the availability of food, the tinting of when he eats, and the type and quantity of food he eats." Id. at 924. Because the ADA addresses substantial limitations on major life activities, not utter inabilities, Bragdon v. Abbott, 524 U.S. 624, 641 (1998) (cited in Lawson, 245 F.3d at 924), the Seventh Circuit went on to hold that [t]he district court failed to consider the extent of the restrictions imposed by Mr. Lawson's treatment regimen and the consequences of noncompliance with that regimen. Lawson, 245 F.3d at 924. As explained in his brief, Orr has experienced seizures, deteriorated vision, slurred speech, frequent urination, lack of concentration, awareness, coordination, strength, and consciousness, all of which can, and frequently does [sic], result in hospitalization. These allegations are not what could happen, but are evidentiary proofs of what has happened when Orr is not allowed to follow a rigid discipline of eating at a scheduled time. This is

verified through the record by Orr's deposition and medical reports. I respectfully submit that we should follow Judge Ripple's reasoning in Lawson, and hold Orr's eating and working are fundamental, major life activities that are substantially limited due to his diabetes. A distinguished panel of Judge Cudahy and Judge Easterbrook joined Judge Ripple, and I find it unreasonable to ignore our sister circuit simply because of the mistaken belief that plaintiff's counsel failed to raise that argument in the district court.[8] Furthermore, our review should be based on the full evidentiary record before us, not limited to cited cases.

Orr also testified that when he was hired by Wal-Mart, he told them of his disability and Wal-Mart agreed that they would accommodate his eating habit at noon. The district court noted that this fact was denied by Wal-Mart, but held it was not material to the issue at hand. I respectfully disagree. I think these claims set forth genuine issues of material fact relating to the questions of disability and reasonable accommodation. See Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 954-55 (8th Cir. 1999). These claims should therefore be submitted to the trier of fact.[9]

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[8]We note Lawson was decided barely two weeks before Orr's response to the defendant's motion for summary judgment was filed. It does not, therefore, seem so unusual for that decision to be cited for the first time in the district court's Memorandum and Order granting summary judgment, issued some four months later.

[9]There is additional proof that Wal-Mart has now changed its policy and allows an uninterrupted lunch break at its single-pharmacist store in Chadron. This relates to the claim that Wal-Mart refused to make a reasonable

In conclusion, I submit that this is not an appropriate case for summary judgment by the court.

On this basis, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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accommodation and is further proof of a pretextual reason for Orr's discharge. These proofs address factual issues appropriate for a jury's resolution.

APPENDIX B
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 0.1-2959

Stephen C. Orr,	*
	*
Appellant,	*
	*
vs.	* Order Denying Petition for
	* Rehearing and for Rehearing
Wal-Mart Stores, Inc.,	* En Banc
	*
Appellee.	*

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge McMillian and Judge Bye would grant the petition for rehearing en banc.

Judge McMillian dissents from the denial of the petition for rehearing en banc.

Judge Morris Sheppard Arnold took no part in the decision in this matter.

(5128-010199).

September 18, 2002

Order Entered at the Discretion of the Court:

"s/_____"

Clerk, U.S. Court of Appeals, Eighth Circuit